

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Lead Case No. 08-99000-smb

4 - - - - - x

5 Adv. Case No. 08-01789

6 - - - - - x

7 In the Matter of:

8

9 SECURITIES INVESTOR PROTECTION CORPORATION,

10 Plaintiff,

11 v.

12 BERNARD L. MADOFF INVESTMENT SECURITIES, LLC, et al.,

13 Defendants.

14 - - - - - x

15 Adv. Case No. 10-04390

16 - - - - - x

17 In the Matter of:

18

19 IRVING H. PICARD, Trustee For The Liquidation of Bernard L.

20 Madoff Investment Securities LLC,

21 Plaintiff,

22 v.

23 BAM L.P., ET AL,

24 Defendants.

25 - - - - - x

1 Adv. Case No. 10-05383

2 - - - - - x

3 In the Matter of:

4

5 IRVING H. PICARD, Trustee for the Substantively

6 Consolidated SIPA Liquidation of Bernard L.

7 Madoff Investment Securities LLC and the Estate

8 of Bernard L. Madoff,

9 Plaintiff,

10 v.

11 SHAPIRO ET AL,

12 Defendants.

13 - - - - - x

14

15 United States Bankruptcy Court

16 One Bowling Green

17 New York, NY 10004

18

19 September 26, 2018

20 10:05 AM

21 B E F O R E :

22 HON STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: MATTHEW

1 HEARING re Case No. 08-01789 Hearing on Order to Show Cause  
2 Why October 4, 2016 Order Appointing Discovery Arbitrator  
3 Should not be Amended  
4

5 HEARING re Case No. 08-01789 Motion to Strike the Notices of  
6 Withdrawal of claim and Notices of withdrawal of Objection  
7 to Determination of Claim  
8

9 HEARING re Case No. 10-04390 Pre-Trial Conference  
10

11 HEARING re Case No. 10-05383 Discovery Conference  
12  
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25 Transcribed by: Sonya Ledanski Hyde

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. Good morning.  
3 Madoff.

4 MR. CREMONA: Good morning, Your Honor. Nicholas  
5 Cremona of Baker & Hostetler, appearing on behalf of the  
6 Trustee. I have here with me my colleague, Anat Maytal and  
7 Nathanael Kelley on behalf of Pacific.

8 Your Honor, there are two matters on the agenda  
9 this morning. I would propose proceeding with the pretrial  
10 conference in the Mann case, which is 10-04390. Just to put  
11 it into context by way of background, Your Honor, this is a  
12 case against Michael and Cheryl Mann and Bam, LP. This is a  
13 case that has completed discovery as of February --  
14 completed fact discovery as of February 2015 and completed  
15 expert discovery as well.

16 There are also, I think, which is relevant to the  
17 motion that we're going to discuss next -- but for Your  
18 Honor's edification, there are claims filed on behalf of  
19 both Defendants here and there are pending objections to the  
20 Trustee's denial of those claims. And those objections were  
21 filed in 2009.

22 THE COURT: Is this part of the motion to  
23 withdraw? Why don't we deal with the motion to withdraw?  
24 Because this is really the tail wagging the dog.

25 MR. CREMONA: Well, we can, Your Honor, but I

1 think --

2 THE COURT: In other words, you're telling me you  
3 don't agree -- that you can't agree to summary judgment so  
4 the case is trial ready, right?

5 MR. CREMONA: That's correct.

6 THE COURT: But then we get into the question of  
7 where the case is going to be tried.

8 MR. CREMONA: Well, I think, Your Honor, that  
9 question has been answered by Judge Daniels and he --

10 THE COURT: Why don't we deal with that motion  
11 first? Because that's a gating issue really.

12 MR. CREMONA: Well, I think -- I don't think it is  
13 because there's no motion to withdraw the reference. And  
14 Judge Daniels has said that Your Honor has final  
15 adjudicative authority to dispose of this matter as a final  
16 matter based on the fact that there's a pending claim and a  
17 pending objection, which is extant, and that was ruled upon  
18 twice by Judge Daniels. So, I'm happy to proceed however  
19 Your Honor sees fit.

20 THE COURT: Yeah, I'd like to hear that motion  
21 first. Because there's no point scheduling a trial if I  
22 don't have -- if they have a right to a jury trial and I  
23 can't try it. Right?

24 MR. CREMONA: I understand that, Your Honor.

25 THE COURT: So, why don't you tell me about that

1 motion?

2 MR. CREMONA: Sure. The second matter, Your  
3 Honor, is the Trustee's motion to strike certain claim  
4 withdrawals and objections that were filed by the Chapman  
5 firm and the Dentons firm on behalf of 52 total  
6 defendant/claimants. The Trustee asserts or submits that  
7 the motion should be granted for three principal reasons:  
8 First, the attempted withdrawals are procedurally improper.  
9 They violate Bankruptcy Rule 3006. They were done  
10 unilaterally and without order or leave of this Court.

11 Second -- and this is just briefly -- I'll get  
12 into each of these in more detail.

13 THE COURT: Well, but they're going to argue that  
14 -- they'll just withdraw their objections, which under Rule  
15 3006, they don't need any --

16 MR. CREMONA: That's my next point, Your Honor. I  
17 think if you --

18 THE COURT: -- any permission.

19 MR. CREMONA: Sorry, sorry.

20 THE COURT: Go ahead.

21 MR. CREMONA: If you -- putting aside the  
22 procedural definition. So, if you then look to Rule 41,  
23 which is what courts have looked to to determine whether you  
24 can make that -- such a withdrawal under Rule 3006. Rule  
25 41, the standard there cannot be met here because of the,

1 among other things, the prejudice that would result in the  
2 net loser victims, and there are a number of other factors  
3 that the Second Circuit enumerated, and we can go through  
4 them each in the Zagano case.

5 THE COURT: What's the prejudice to the net  
6 losers?

7 MR. CREMONA: I think one very illustrative  
8 example is demonstrated by three of the cases that are  
9 subject to the motion. That's the Saran Lawrence and  
10 Nelsons cases. If Your Honor will recall, we were here last  
11 May -- May 31 for a pretrial conference. Then you gave --  
12 you scheduled -- Your Honor scheduled trial in October,  
13 provide --

14 THE COURT: May 31 of 2017?

15 MR. CREMONA: Yes. And -- I'm sorry if I  
16 misspoke. And Your Honor provided sufficient time for -- a  
17 motion to withdraw was filed in June. That wasn't  
18 determined by Judge Daniels until May of this year, and then  
19 a reconsideration motion was filed, determined now on  
20 September 11th of this year.

21 So now we are here 15 months after that, and I  
22 think that's a significant delay. It precludes us from our  
23 ultimate goal and our ultimate duty, which is to bring  
24 forward these cases to resolution --

25 THE COURT: But I can't do anything about that

1 delay. That's -- that's done. You know, going forward,  
2 what's the prejudice? In other words, if I allow them to  
3 withdraw the claim, and that leads to the conclusion that I  
4 lack equitable jurisdiction, which is a separate issue --

5 MR. CREMONA: Mm hmm, understood.

6 THE COURT: -- and they get to try their case in  
7 District Court, what's the -- what's the prejudice?

8 MR. CREMONA: I do think delay is a significant  
9 factor, Your Honor, because the only way that that occurs --

10 THE COURT: What's the evidence of delay, though?

11 MR. CREMONA: The procedural posture of the case  
12 is. We have now four cases that are trial-ready. What  
13 would have to happen for those not to go forward before Your  
14 Honor is a motion to withdraw the reference, which would add  
15 15 months onto each of those cases. And that's going to  
16 happen seriatim and then we can never accomplish the goal,  
17 as I said, which is to resolve these cases and get the net  
18 loser victims their -- their principal that they haven't yet  
19 received.

20 But I think, you know, I'm happy to go through the  
21 other Zagano factors as well, which I think militate in  
22 favor of granting the Trustee's motion. And that is -- you  
23 know -- well, again, so if you look at the Zagano factors,  
24 Your Honor, the question becomes the diligence in bringing  
25 the motion or the filing; the extent to which the suit has

1 progressed, or here, the claims process; the effort and  
2 expense that has been incurred; and duplicative expense in  
3 re-litigation and the adequacy of the Plaintiff's  
4 explanation. Or here I would say the claim.

5 So, diligence, if we start there, Your Honor,  
6 we're ten years into this liquidation. This withdrawal was  
7 unilaterally filed on the heels of Judge Daniels' decision.  
8 That can't not -- that cannot be ignored. That decision was  
9 issued on, as I said, May 15 of this year. These filings  
10 occurred on June 1, again on June 29, and then again in  
11 July.

12 It was clearly an effort, I would submit, to avoid  
13 this Court's equitable jurisdiction, and it was directly in  
14 response to Judge Daniels' decision, which said the claims  
15 are pending, the objections are pending, they are live. And  
16 I'm happy to go through the claims process. I know Your  
17 Honor is intimately familiar with that. But those facts  
18 rendered Your Honor with final adjudicative authority to  
19 dispose of these adversary proceedings. And, again, we're  
20 back to delay.

21 Because if Your Honor is able to do that, we can  
22 expeditiously go to trial and get these pieces resolved. If  
23 Your Honor does -- does something which I would respectfully  
24 submit would be inconsistent with the directives of Judge  
25 Daniels, then there's an enormous delay. And, again, those

1 are just two of the factors. I think, you know, the  
2 adequacy of the explanation for the withdrawal -- I mean, to  
3 me, it is quite clear, as I just articulated, that I would  
4 go so far as to say it's gamesmanship. The timing and the  
5 withdrawal are clearly an effort to circumvent this Court's  
6 jurisdiction.

7 There's been a clear and significant effort in  
8 prosecuting the claims process, and we should discuss that a  
9 moment, Your Honor. I know Your Honor is intimately  
10 familiar with the claims and objections and the way that we  
11 -- the Trustee has disposed of those. Just this week you  
12 entered the 21st omnibus order.

13 All along in this process the Trustee has disposed  
14 of or -- or sought affirmation of his prior determinations  
15 by Your Honor because there were no legal issues remaining,  
16 and all of those issues were finally resolved. These cases  
17 are quite different, Your Honor. And you'll note that in  
18 none of those 21 prior motions was there ever a defendant  
19 included that had a claim because the proper place for the  
20 resolution of that -- those claims issues, which are  
21 inextricably intertwined with the avoidance liability, as  
22 Your Honor has recognized in the Cohen decision, which was  
23 articulated by Judge Rakoff -- we are bound by that.

24 As such, the Trustee has specifically delayed --  
25 well, not delayed. We are waiting until we can resolve

1 these all in one forum, which is the directive from the  
2 District Court. Now, we have it once from Judge Rakoff.  
3 Your Honor has implemented that. Now we have it twice more  
4 from Judge Daniels, and I would submit that to do something  
5 inconsistent with that is -- is ignoring the precedent and  
6 the law in this case.

7 THE COURT: Let me just stop -- their argument is  
8 "Look, we're going to withdraw our claims. So there's no  
9 claims resolution process remaining for our claims." That's  
10 their argument.

11 MR. CREMONA: I understand. I think that -- that  
12 -- there are a number of problems with that, Your Honor, a  
13 lot of which I just described. That would be embracing  
14 procedural gamesmanship, it would be disregarding the law  
15 that says when you submit a claim, you've now submitted to  
16 the Court's equitable jurisdiction.

17 THE COURT: For the claims -- for the claims  
18 resolution process.

19 MR. CREMONA: Right. But when the claim that  
20 requires resolution is inextricably intertwined with the  
21 avoidance liability, which we know from Judge Rakoff is the  
22 case here. One -- and I think Your Honor acknowledged, you  
23 cannot divorce the claims liability --

24 THE COURT: I understand all that, Mr. Cremona.

25 MR. CREMONA: Okay.

1 THE COURT: But what they're saying is there's no  
2 longer a claims resolution process because they're  
3 withdrawing their objection or they're withdrawing their  
4 claim.

5 MR. CREMONA: Okay, but, Your Honor --

6 THE COURT: So, why don't you address that issue?

7 MR. CREMONA: Sure. I think, again, there are a  
8 number of ways to address that. We have here a contested  
9 matter based on the objection that was filed to each of the  
10 claims. If you look to the claim that was filed and appended  
11 to the Dentons' objection, in Paragraph 24, they  
12 specifically say that they want the rights accorded to a  
13 contested matter under 9014, including discovery.

14 So it's not just a ministerial act of withdrawing  
15 a claim; there is a conjoined contested matter --

16 THE COURT: Well, there can be conditions to the  
17 withdrawal.

18 MR. CREMONA: I suppose there could, Your Honor,  
19 but I think --

20 THE COURT: I'll ask them about that but...

21 MR. CREMONA: Okay. I would submit that the time  
22 to do that has now since passed. And to allow it to occur  
23 would be directly contravening Judge Daniels' decision.  
24 These very same issues were put before him and he ruled that  
25 Rule 30056 renders these withdrawals ineffective. And, as

1 such, they remain pending. And they do remain -- and as we  
2 articulated in the declaration of Segal, all of those  
3 objections that are the subject of this motion have not been  
4 disposed of for the very reasons I just articulated in the  
5 claims process.

6 And to answer your question further, I think to  
7 allow them to just simply withdraw it now is to contravene  
8 the claims procedures order, it is to disregard the entire  
9 claims process that we've utilized over the last nine-plus  
10 years. And, again, I do think that we have to stand on  
11 principle and the law that you can't on one hand invoke this  
12 Court's jurisdiction and then disavow it when it's suitable  
13 to your client. I mean, that is just -- that's exactly  
14 what's happening here. And I would submit that that is  
15 totally inappropriate. And as a result, the claims should  
16 be stricken.

17 And the other point, I think, Your Honor, which I  
18 haven't yet made -- and we make it in our papers, is that,  
19 again, I've said that the claims are inextricably  
20 intertwined with the avoidance liability. But I think it's  
21 important to point out too that when you look at the  
22 objections that are attached and filed, and the affirmative  
23 defenses in the answer, they are at the core the same  
24 issues. And, again, it would be inefficient to resolve them  
25 separately. The opportunity to do so has passed.

1 THE COURT: But, you know, you keep saying that,  
2 but they're saying, "Look, you've resolved the claims. It's  
3 zero."

4 MR. CREMONA: But that -- well, again, if we look  
5 at 502D and the decision from Judge Rakoff, it applies here.  
6 There is a pending claim and you can't resolve the claim  
7 until your avoidance liability has been established with  
8 finality.

9 THE COURT: But you're saying we're not -- okay, I  
10 got it. Go ahead.

11 MR. CREMONA: I mean, Your Honor, do you have any  
12 further questions that you'd like --

13 THE COURT: No, no. Let me hear from the other  
14 side. Yes, sir?

15 MR. KELLEY: Yes. If I may, I'm Nathanael Kelley  
16 for the Securities Investor Protection Corporation. I'll  
17 just state briefly that we invoked to address the  
18 applicability of the federal rules of bankruptcy procedure  
19 to this SIPA liquidation. And we were, frankly, a little  
20 surprised that that was an issue but --

21 THE COURT: Well, Judge Daniels really decided  
22 that in that Footnote 3, so I'm not even going to consider  
23 that.

24 MR. KELLEY: Sure. And regarding the  
25 applicability of the -- regarding their attempt to withdraw

1     their objections, just I'd like to point out that it --  
2     filing the objections initiated a contested matter, which  
3     under Rule 9014, the federal (indiscernible) Procedure 41 is  
4     (indiscernible) and addresses that issue.

5             THE COURT: All right.

6             MS. NEVILLE: Good morning, Your Honor. Carol  
7     Neville from Dentons on behalf of the Dentons customers. I  
8     feel like I'm living in a parallel universe. The claims  
9     procedure and the adversary proceeding are not inextricably  
10    linked.

11            THE COURT: Well, but the fictitious profits issue  
12    is the same thing as the net equity issue. It's --

13            MS. NEVILLE: Mm hmm. But that's not -- that's  
14    not the resolution of the adversary proceeding.

15            THE COURT: No, I understand that.

16            MS. NEVILLE: This phrase, there's two sides to  
17    the same coin, is their phrase, which Judge Rakoff was just  
18    reciting. It's not --

19            THE COURT: Well, how does the computation of  
20    fictitious profits differ from the computation of net  
21    equity?

22            MS. NEVILLE: It doesn't.

23            THE COURT: Okay.

24            MS. NEVILLE: But that's not the end of the story  
25    in the adversary proceeding. That was the case in the old

1 equity receiverships and through the Ponzi scheme cases.  
2 We've argued ad nauseam that that's not what the standard  
3 for 548C is. But let me just -- let me just point out that  
4 in the complaint --

5 THE COURT: But as a factual -- as a factual  
6 matter, the computation of net equity and the computation of  
7 fictitious profits are the same under the case law.

8 MS. NEVILLE: Under the case law, but that doesn't  
9 mean that the claims procedure in this case and the  
10 adversary are inextricably linked. If you look at the  
11 complaint, it doesn't say, "You filed a claim and we're  
12 going to resolve it in connection -- on the same standard"  
13 or anything else. On the contrary, it says, "We know you  
14 filed a claim. We're going to resolve it in another  
15 proceeding."

16 THE COURT: Right. So, if they win -- in other  
17 words, if they can convince whoever decides this case that a  
18 fraudulent transfer occurred, that claim is automatically  
19 disallowed under 502D. All they have to do is, you know,  
20 make a one-paragraph motion.

21 MS. NEVILLE: Well, normally --

22 THE COURT: So, and it will be resolved --

23 MS. NEVILLE: -- the 502D claim would be put in  
24 here --

25 THE COURT: Well, it doesn't have to be. But --

1 MS. NEVILLE: Well, let me just say --

2 THE COURT: In other words, you seem to be arguing  
3 that they're splitting their cause of action somehow.

4 MS. NEVILLE: Well, they did. Because they went  
5 up three times to the Second Circuit on the claims  
6 resolution procedure.

7 THE COURT: Why are you withdrawing -- this is  
8 really a question for both sides -- both parties. Why are  
9 you withdrawing your claims now?

10 MS. NEVILLE: I didn't withdraw a claim. I  
11 withdrew the objection to --

12 THE COURT: But how does that -- but how... As I  
13 under -- as I recall the procedures order, if you don't file  
14 an objection to the Trustee's determination within 30 days,  
15 the claim is deemed disallowed, right?

16 MS. NEVILLE: Right.

17 THE COURT: Okay. You filed an objection, so the  
18 withdrawal of your objection under the procedures order  
19 doesn't lead to a deemed disallowance of your claim.

20 MS. NEVILLE: Well, let me just point out that for  
21 nine years --

22 THE COURT: So you have to withdraw the claim.

23 MS. NEVILLE: -- we have gone up to the Second  
24 Circuit three times and had rulings on each of the issues in  
25 the objection. So what my argument is, is that there is

1 finality in the claims allowance procedure.

2 THE COURT: Could I -- could I allow you to  
3 withdraw the claim... First of all, let me ask you a  
4 question: You're withdrawing your claim with prejudice?  
5 That would be the scenario.

6 MS. NEVILLE: I didn't withdraw the claims; I  
7 withdrew the objections. That's a different --

8 THE COURT: So you're not withdrawing your claims?

9 MS. NEVILLE: The claim is sitting there. That's  
10 why the motion is completely idiotic with respect to my  
11 claim.

12 THE COURT: All right, so there's still a pending  
13 claim?

14 MS. NEVILLE: There are still pending claims.

15 THE COURT: So, there's a pending claim that I  
16 have equitable jurisdiction to try the answer --

17 MS. NEVILLE: But those claims have been finally  
18 determined and disallowed.

19 THE COURT: When?

20 MS. NEVILLE: In three rulings of the Court. All  
21 they're doing in the omnibus objection is filing an  
22 administrative order that goes through each of the three  
23 rulings. That's all there is.

24 THE COURT: Let me ask you a different question.  
25 Could I condition -- you're not asking me to condition

1 anything? You're saying that your claim was disallowed but  
2 yet there's a pending -- there's a pending claim, right? I  
3 don't know if it's disallowed.

4 MS. NEVILLE: Pardon me?

5 THE COURT: I don't know if it's disallowed.

6 MS. NEVILLE: Well, I would say it's disallowed.  
7 But the point of this motion -- and you don't have to decide  
8 anything on my claim today -- all you have to decide -- and  
9 you don't have to decide whether or not filing a claim in --  
10 under the circumstances of this case confirm equitable  
11 jurisdiction on this Court. That's not Second Circuit law.  
12 But you don't have to decide that today.

13 THE COURT: I thought your main said that the  
14 filing of the claim submits the creditor to the equitable  
15 jurisdiction of the Court for the purpose of the claims  
16 resolution process.

17 MS. NEVILLE: But the claims resolution process  
18 has gone on a completely separate track and is only related  
19 tangentially to the adversary.

20 THE COURT: So, can I ask you a question? Can I  
21 ask you a question? If your claim is resolved, why don't  
22 you simply withdraw it?

23 MS. NEVILLE: I could. I could.

24 THE COURT: So, if you withdraw the claim, could I  
25 impose conditions on that?

1 MS. NEVILLE: Like what?

2 THE COURT: For example, that that is race  
3 judicata as to the issues relating to the claim objection?  
4 Which would mean to me that all of those withdrawals and  
5 deposits listed in the Trustee's determination later are  
6 established for the purposes of the litigation -- for the  
7 case?

8 MS. NEVILLE: They would be --

9 THE COURT: And the reason I raise that is, you  
10 know --

11 MS. NEVILLE: I get it --

12 THE COURT: And let me tell you why. Maybe you  
13 didn't raise it, but I know. Ms. Chatman raised it a lot,  
14 notwithstanding the resolution of the legal issue, the net  
15 investment method, and things like that. There were a  
16 series of discovery disputes relating to the inability to  
17 stipulate to the actual deposits and withdrawals. So that's  
18 a live issue, even though the law has been resolved. I  
19 don't know if you had stipulated, you know, to the  
20 withdrawals and deposits but that's still a live issue. But  
21 let me ask --

22 MS. NEVILLE: I didn't stipulate to withdrawals  
23 and deposits in each case --

24 THE COURT: Okay, well, then --

25 MS. NEVILLE: -- because there were documents

1 missing and we couldn't --

2 THE COURT: All right. So the Trustee's got --  
3 so, suppose at the end of the day, the Trustee cannot prove  
4 his case. He cannot prove the actual withdrawals or  
5 deposits, which means he can't prove you got fictitious  
6 profits presumably, and he can't even justify his net equity  
7 determination.

8 If you withdraw the claims with prejudice, does  
9 that mean you will give up the rights to SIPC Insurance and  
10 to a distribution -- I'm asking you this because I don't  
11 know if you've discussed this with your clients. That's  
12 where we're going with this.

13 MS. NEVILLE: I did discuss it with my clients.

14 THE COURT: All right, you don't have to --

15 MS. NEVILLE: Because I felt like under any  
16 circumstance the claims pool was never going to be increased  
17 by the allowance of their claims. So I asked them early on  
18 in the case if they were willing --

19 THE COURT: You don't have to tell me what you  
20 discussed with them.

21 MS. NEVILLE: Right.

22 THE COURT: I just -- that is something that could  
23 occur under, you know, based upon what you're -- the relief  
24 you're seeking? Is that --

25 MS. NEVILLE: Yes, that's true. That's a

1 consequence.

2 THE COURT: Okay.

3 MS. NEVILLE: But I really do believe that they --  
4 they are using this motion to establish a link between the  
5 adversary proceeding and the claims process, which has been  
6 so separated. You know, we have gone up, honestly, three  
7 times to the Second Circuit --

8 THE COURT: But how can they be separated if the  
9 claim is the basis for exercising equitable jurisdiction?

10 MS. NEVILLE: Only if it involves the claims  
11 process. And if the claims process is in Alaska, it doesn't  
12 affect Hawaii, you know? That's what's going on here.

13 THE COURT: I'm not sure I follow that one but --

14 MS. NEVILLE: Well, I was geographically  
15 challenged there.

16 THE COURT: Well --

17 MS. NEVILLE: But I think that -- I think that  
18 there is --

19 THE COURT: I'm not sure I understand the  
20 geographic metaphor but go on.

21 MS. NEVILLE: Right. It wasn't a great one. I  
22 withdraw it. With prejudice. I do think that -- the first  
23 point is that there is a real separation. And they missed  
24 an opportunity in the adversary proceeding to make that  
25 link.

1 If you look at every one of the withdrawal cases  
2 on the claims it's because the case was filed, or the claim  
3 was filed, and then the counterclaim or an adversary was  
4 attached to it. That isn't what happened here. It's going  
5 off on this direction; the adversary is going on another.  
6 Just because there's an overlap of one fact.

7 THE COURT: You and I are reading different cases.

8 MS. NEVILLE: What?

9 THE COURT: You and I are reading different cases.

10 MS. NEVILLE: Okay. Well, I doubt it because I've  
11 got a whole slew of them back here about disallowance of  
12 claims under 3006. And I'm not even sure that rule applies  
13 in the SIPC.

14 THE COURT: Well, Judge Daniels has said it does  
15 and I think it --

16 MS. NEVILLE: Well, but Judge Daniels doesn't have  
17 any of my cases. So, you know --

18 THE COURT: Well, it's per choice of ability.

19 MS. NEVILLE: Well -- it really is undisputed that  
20 they do say in the complaint "We are not resolving your  
21 claims here. We're resolving them over there."

22 And the second thing is that I do believe that the  
23 Second Circuit law is pretty clear that you don't  
24 irrevocably confer equitable jurisdiction by filing a claim  
25 if it doesn't involve the claims process, which this does

1 not. It may involve how you calculate some aspect -- how  
2 they calculate an aspect of fictitious process but it  
3 doesn't affect the claims process.

4 So I think that this motion just avoids the  
5 history of the case. For them to complain that we have  
6 participated actively in the case and therefore we shouldn't  
7 be allowed to withdraw anything is ridiculous.

8 THE COURT: Well, that was partially in response,  
9 I think, to someone and it may have been the Chapman  
10 clients, who made the argument that our claims were  
11 essentially disallowed in --

12 MS. NEVILLE: I said that.

13 THE COURT: Let me finish. In 2012 with the  
14 issuance of the net -- the net investment decision, net  
15 equity decision. And yet thereafter there was litigation  
16 related to the claims like the time-based damages issue and  
17 things like that. So, you know, the question is, well, if  
18 the claim was resolved in 2012, why are you litigating all  
19 these things -- or the interaccount transfer issue -- why  
20 are you litigating those if your claim is resolved?

21 MS. NEVILLE: Well, I think those three rulings  
22 for the Second Circuit cover basically all the objections in  
23 the various --

24 THE COURT: They cover the legal issues. I agree  
25 with you. Probably.

1 MS. NEVILLE: -- holdings that we have. So,  
2 really all that was left is for them to do something to  
3 remove the -- to finally determine the claim. I -- they did  
4 not -- I didn't withdraw the claims. And their motion has  
5 nothing to do -- doesn't -- it barely even mentions the  
6 withdrawal of the objections.

7 THE COURT: So, okay, so, if I forget about their  
8 motion, I have filed claims and then I have equitable  
9 jurisdiction, don't I?

10 MS. NEVILLE: I don't think you do because --

11 THE COURT: Why not? If there's an ending claim -  
12 -

13 MS. NEVILLE: For the reason I just said. Because  
14 you only had equitable jurisdiction to the extent that it  
15 involved a claims resolution.

16 THE COURT: But you're not withdrawing your  
17 claims.

18 MS. NEVILLE: The claim is finally determined.

19 THE COURT: I disagree. I disagree.

20 MS. NEVILLE: What's left to do?

21 THE COURT: To determine whether the Trustee has  
22 correctly calculated the withdrawals and deposits, which you  
23 don't seem to agree. And you want to put him to his proof.  
24 Right? Are you willing to concede --

25 MS. NEVILLE: That he has correctly --

1 THE COURT: -- that as part -- that you are bound  
2 by the Trustee's determination letter, and specifically his  
3 analysis of the withdrawals and the deposits, which are the  
4 same things in the complaint, by the way, which he always  
5 attaches to those dispositions?

6 MS. NEVILLE: Not always the same thing but close.

7 THE COURT: Yeah. Well, I haven't noticed a  
8 difference. I've looked at a lot of them but okay.

9 MS. NEVILLE: I haven't -- I'd have to go back and  
10 look because in some of the cases there are no proofs of  
11 payments made, there are no checks that --

12 THE COURT: I understand that! All I'm saying is  
13 you are contest -- you're saying you're not withdrawing your  
14 proof of claim, then you're saying, "You know what? Maybe  
15 he didn't calculate it right. Maybe at the end of the day  
16 I'm a net loser." Let me hear from --

17 MS. NEVILLE: Let me just say one thing.

18 THE COURT: Go ahead.

19 MS. NEVILLE: A couple more things because I think  
20 it's important. 3006 does not apply to the withdrawal of  
21 the objections.

22 THE COURT: Right, okay.

23 MS. NEVILLE: So that's pretty clear. And I'm not  
24 even sure they apply in this case at all. 7041 or 41 gives  
25 me the right to withdraw when they haven't answered or moved

1 for summary judgment.

2 THE COURT: Why would the Federal Rules of Civil  
3 Procedure 41 apply?

4 MS. NEVILLE: Well, what they're arguing is if you  
5 can't go to 3006, you use Rule 41 --

6 THE COURT: Well, 3006 directs you to Rule 41  
7 anyway.

8 MS. NEVILLE: Well, but that would be -- yes, but  
9 in a different level because what they're saying is that my  
10 filing of the objection --

11 THE COURT: Well, let me ask you a question.  
12 You're fighting over this issue. What's the difference if  
13 3006 governs the withdrawal of the claim or the objection or  
14 Rule 41 governs it?

15 MS. NEVILLE: Because Rule 41 says that if they  
16 haven't answered my contested matter or moved for summary  
17 judgment, then I get to withdraw as a right. Where have  
18 they?

19 THE COURT: The Trustee's determination is the  
20 answer to what is effectively a complaint -- filing of a  
21 claim.

22 MS. NEVILLE: Oh, please. That's such a far-  
23 fetched -- a far-fetched characterization of the complaint  
24 because the complaint doesn't deal with the claims.

25 THE COURT: Okay, I got it. Let me hear from Mr.

1 Dexter.

2 MR. DEXTER: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MR. DEXTER: Greg Dexter here with the law firm of  
5 Chapman, LLP, on behalf of the Defendants represented by  
6 Chapman, LLP. Your Honor, it's highly unusual for any  
7 litigant to contest another litigant's withdrawal of a  
8 claim, a complaint, a lawsuit with prejudice. All of the  
9 cases involved without prejudiced dismissals. They  
10 contemplate --

11 THE COURT: At least not the cases I've seen.

12 MR. DEXTER: Which cases is Your Honor referring  
13 to?

14 THE COURT: Why don't you continue?

15 MR. DEXTER: It's highly unusual for a court to  
16 even scrutinize whether a litigant can withdrawal a  
17 complaint or a claim with prejudice. We're saying that  
18 they've won. They've determined the claim, and that's it.  
19 And to resolve any doubts --

20 THE COURT: So, if that's true, why do we have  
21 Rule 3006?

22 MR. DEXTER: Because I don't think Rule 3006 was  
23 written in contemplation of someone filing a SIPC claim.

24 THE COURT: No, no, no, no. As a general matter,  
25 Rule -- in an ordinary bankruptcy, let's put this aside --

1 in this situation you couldn't simply withdraw the claim.  
2 You would have to get a court order. If you have the --  
3 what you're arguing essentially is if you want to withdraw  
4 your claim with prejudice, you have an absolute right to do  
5 so. But that's not what Rule 3006 says. So, why not?

6 MR. DEXTER: I think Rule 3006 is written with the  
7 view that it's a claim you're making in Bankruptcy Court;  
8 not for SIPC Insurance, not against --

9 THE COURT: Forget about SIPC. I'm just asking  
10 about Rule 3006.

11 MR. DEXTER: Right.

12 THE COURT: If you have an absolute right -- if a  
13 creditor has an absolute right to withdraw a claim, why --  
14 why does -- why isn't that included in Rule 3006? Why do  
15 you need a court order?

16 MR. DEXTER: I don't know. I wasn't there when  
17 they drafted it. But if you look at the rule, it  
18 contemplates you filing that complaint in another court, in  
19 a non-bankruptcy court. It's impossible --

20 THE COURT: That's not what it says.

21 MR. DEXTER: -- for us to file that claim.

22 THE COURT: You can't file that claim in another--

23 MR. DEXTER: But that's the whole point. If you  
24 look at the cases that say the prejudice to a litigant of  
25 having a case dismissed, the prejudice is that potentially

1 they're going to be sued in another forum.

2 THE COURT: Just -- Mr. Dexter. Just explain to  
3 me the rationale for why Rule 3006 does not say, in  
4 substance, that a creditor can always withdraw his claim  
5 with prejudice without Court permission.

6 MR. DEXTER: Because usually it contemplates the  
7 fact that the claim might be filed in another Court.

8 THE COURT: No, it doesn't. That's the silliest  
9 thing I've ever heard. The only place you can file a claim  
10 is in the bankruptcy.

11 MR. DEXTER: Well, you can -- okay, Your Honor  
12 might be right about that. Then I don't -- I'm not sure the  
13 answer to that offhand.

14 THE COURT: All right, well that suggests that you  
15 don't have an absolute right to withdraw a claim with  
16 prejudice; doesn't it?

17 MR. DEXTER: And then the question becomes how is  
18 the Trustee harmed at all if we withdraw the claim, and he's  
19 not.

20 THE COURT: You think that's the only question?

21 MR. DEXTER: Yeah. So we come to Your Honor and  
22 Your Honor has the authority to determine whether we're  
23 going to be permitted to withdraw the claims and objections  
24 and you look at the Zagano factors and there's not a single  
25 case that's even close to the circumstances here that would

1 support Your Honor making a ruling saying that we can't --

2 THE COURT: I think you have to do a little more  
3 research. Let me stop everybody. There are a couple of  
4 issue here. One issue that nobody has addressed is the  
5 general proposition that a Court's jurisdiction is  
6 determined when the proceeding is filed. And subsequent  
7 changes that may affect that jurisdiction don't affect the  
8 Court's underlying jurisdiction. So you're going to have to  
9 brief that issue.

10 And I think you should start with Judge Walsh's  
11 decision which is on all fours with this case, by the way in  
12 EXDS, which is 301 Bankruptcy Reporter 436. There are other  
13 cases, too. Another point -- I'm not deciding this today,  
14 but another point is, this Rule 3006 goes back to the old  
15 Bankruptcy Act, Rule 3005. And the reason for the rule was  
16 to prevent somebody from doing precisely what you're doing  
17 which is withdrawing a claim and stripping the Court of then  
18 summary jurisdiction for the purposes of defeating  
19 Bankruptcy Court's jurisdiction. So those are issues that  
20 are in the case. I know you're talking about the Zagano  
21 factors and all that. You know, you have to lay -- it looks  
22 to me like the only reason you're withdrawing claim at this  
23 point is to defeat jurisdiction and ultimately delay the  
24 resolution of the case. But I think you have to discuss  
25 that threshold issue of whether the withdrawal of the claim

1 or the attempted withdrawal of the claim affects the  
2 Bankruptcy Court's equitable jurisdiction if the claim  
3 itself provided the basis for the equitable jurisdiction. I  
4 mentioned Judge Walsh's decision. There are others that  
5 I've seen that deal with this issue. And you have to deal  
6 with this issue. It may have nothing to do with Rule 41 or  
7 anything else, but...

8 MS. NEVILLE: Your Honor, I think you began to  
9 address that in two decisions in this case and there's one  
10 in the Lehman case.

11 THE COURT: In Applebaum and in Lehman, the claims  
12 resolution process came to an end because there was an  
13 actual disallowance or in Applebaum a deemed disallowance.  
14 That hasn't occurred here.

15 MS. NEVILLE: Well, there's pretty close to it.

16 THE COURT: Well, but it's different. It's still  
17 a live claim. You're still disputing from what I hear of  
18 the Trustee's computation of the net equity --

19 MS. NEVILLE: Not in every case, but in some  
20 cases.

21 THE COURT: Well, that's another problem with the  
22 procedure.

23 MS. NEVILLE: Yes.

24 THE COURT: And the Trustee's right. You really  
25 have to make a motion in each case to withdraw the claim and

1 establish the factors and they may differ in different  
2 cases. But in any event --

3 MS. NEVILLE: I'd like to point out that in the  
4 Mann case it was disallowed because it was prior to Judge  
5 Lippman's initial order on the --

6 THE COURT: So why didn't you withdraw the claim  
7 for 10 years or whatever?

8 MS. NEVILLE: So we disallowed that claim in the  
9 Mann case.

10 THE COURT: All right. I don't have that.

11 MR. CREMONA: Your Honor --

12 MS. NEVILLE: Yes, you do. It was part -- it was  
13 --

14 MR. CREMONA: Your Honor, if I may rebut that. I  
15 mean, now we're getting -- we responded to that very issue.  
16 Ms. Neville is referring to --

17 THE COURT: Which issue?

18 MR. CREMONA: I believe you're referring to the  
19 net equity order that dismissed 78 actions. Or excuse me.  
20 Let me back up.

21 MS. NEVILLE: Claims.

22 MR. CREMONA: Let me be clear.

23 MS. NEVILLE: Disallowed claims.

24 MR. CREMONA: Disallowed the portions of 78 claims  
25 and specifically, Judge Lippman order retained jurisdiction

1 for all issue outside of the pure net equity calculation.  
2 The Mann objection raises issue beyond that and I'd like to  
3 tie that into something I wanted to rebut that they said,  
4 which is something Your Honor pointed out.

5 They're saying they're going to withdraw the claim  
6 and they're going to withdraw the objection or they're not  
7 withdrawing the claim but the point is, even if they  
8 stipulated to the ins and outs and the amounts, that only  
9 gets us half the way there, Your Honor. Unless they were  
10 going to withdraw with prejudice as to all the legal issues  
11 raised in that objection, such that they couldn't raise them  
12 in the adversary proceeding, then that would get us there.

13 THE COURT: Well --

14 MR. CREMONA: But that's the point, though.

15 THE COURT: What issues?

16 MR. CREMONA: Your Honor, in the objection they  
17 raised the statute of limitations, the netting over the life  
18 of the account, prejudgment interest, profit withdrawal.  
19 All of those issues --

20 THE COURT: That might be a reasonable condition  
21 to allow them to withdraw their claim, but they're not  
22 moving to withdraw their claim and --

23 MR. CREMONA: But, Your Honor --

24 THE COURT: You know, we can do one of two things.  
25 I can deny your motion only because it's academic. They're

1 telling me they're not seeking to withdraw their claims.  
2 They say they've withdrawn their objections and I can just  
3 schedule a trial and, you know, then they can make that  
4 argument.

5 MR. CREMONA: Schedule a trial as to --

6 THE COURT: Well, I -- then I guess --

7 MR. CREMONA: That's fine, Your Honor. I think we  
8 can resolve the issue in the Mann trial and I think that's  
9 the most efficient way to do it. They are inextricably  
10 intertwined as we start -- that's where we started.

11 And I think, Your Honor, we -- I'm sorry, if we're  
12 not going to -- we did confer with our experts. We're  
13 prepared to move forward pursuant to the directive of Your  
14 Honor with that case. We have trial dates. We're not going  
15 to resolve it through stipulation. To allow it to continue  
16 in the absence of any motions contravenes the procedure of  
17 the case. Mediation in this case --

18 THE COURT: You never moved to withdraw a  
19 reference of that case, did you?

20 MS. NEVILLE: I may have (indiscernible).

21 THE COURT: Pardon?

22 MS. NEVILLE: I may have (indiscernible).

23 MR. CREMONA: But, Your Honor --

24 THE COURT: But you haven't done it yet. That's -

25 -

1 MR. CREMONA: Your Honor --

2 MS. NEVILLE: This hearing -- I saw that this  
3 hearing was -- currently raised some issues on the withdraw  
4 and I was waiting to see how it turned out. But they can't  
5 keep saying --

6 MR. CREMONA: Your Honor --

7 MS. NEVILLE: -- that there are all these  
8 peripheral issues that are raised once the plan was  
9 disallowed by Judge Lippman --

10 THE COURT: Right.

11 MS. NEVILLE: -- without telling you what they  
12 are.

13 THE COURT: But I thought Mr. Cremona was saying  
14 it was disallowed only to the extent of this net investment  
15 versus last statement --

16 MR. CREMONA: That's precisely correct.

17 THE COURT: -- issue and then if it was disallowed  
18 -- well, if it's not -- you're saying it was completely  
19 disallowed by Judge Lippman's order?

20 MS. NEVILLE: It was disallowed exactly the way --

21 MR. CREMONA: Your Honor, I have the order.

22 THE COURT: It had other issues and I assume you  
23 participated in subsequent litigation solely related to the  
24 claims, like the inter-account transfer issue.

25 MS. NEVILLE: There's no inter-account transfers.

1 THE COURT: All right, and the time based damages  
2 issue which would -- you know, if your claim is disallowed  
3 there's no reason for that participation so obviously you  
4 didn't think your claim was disallowed in total.

5 MS. NEVILLE: So it's disallowed by an order of  
6 Judge Lippman, but not disallowed because there's one other  
7 issue.

8 MR. CREMONA: Your Honor, the order is clear. I'm  
9 happy to hand up a copy.

10 THE COURT: I think I have a copy.

11 MR. CREMONA: It makes clear that it resolves only  
12 the issue as you pointed out, last statement versus net  
13 investment. All other issues were retained -- the  
14 Bankruptcy Court retained jurisdiction as to all other  
15 issues and those include all the other issues raised in the  
16 objection, particularly with Mann.

17 THE COURT: So I'm clear, nobody's trying to  
18 withdraw their claims?

19 MR. DEXTER: No, we are.

20 THE COURT: Okay, so --

21 MR. DEXTER: Yeah, we are.

22 THE COURT: The Chaitman clients are seeking to  
23 withdraw. Then I need briefing on that jurisdictional issue  
24 I mentioned specifically, whether -- if the claim provides  
25 the basis for the Court's equitable jurisdiction at the time

1 the action is commenced, does the withdrawal of that claim  
2 affect the Court's equitable jurisdiction under that line of  
3 cases which say you determine jurisdiction.

4 They deal with subject matter jurisdiction,  
5 admittedly. But under that line of cases that say that the  
6 Court's jurisdiction is determined when the action is filed  
7 and the -- I know I've had cases where the bankruptcy is  
8 dismissed but jurisdiction still exists and we have this  
9 situation. You'll find cases which say that you can't  
10 withdraw the claim to defeat the equitable jurisdiction  
11 Bankruptcy Court. As a matter of fact for the first time in  
12 40 years I looked at Collier's 14 and it deals with this.  
13 So you can supply briefs not exceeding 10 pages in two weeks  
14 of today?

15 MS. NEVILLE: I'd like to --

16 MR. DEXTER: That's fine, Your Honor.

17 MS. NEVILLE: -- participate in that.

18 THE COURT: But you said you're not withdrawing  
19 your claim.

20 MS. NEVILLE: So what are you doing with their  
21 motion to strike my withdrawl of the objection?

22 THE COURT: What's the basis for striking the  
23 withdrawal of the objections?

24 MR. CREMONA: Your Honor, I think the bases are  
25 similar to what I articulated earlier. What I was going to

1 ask Your Honor was a question as to this additional  
2 briefing. I mean, it seems to me -- again, Rule 41 is a  
3 gating issue. If they cannot meet the standard as to that  
4 withdrawal based -- even if you treated this as a motion to  
5 withdraw. So I think we have to back up. We never really  
6 got into -- 3006 precludes the withdrawal here. I think  
7 it's a semantical distinction to make claim versus  
8 objection.

9 THE COURT: Ms. Neville is saying whatever Rule  
10 3006 says -- and maybe I can't withdraw my claim without  
11 Court order -- Rule 3006 doesn't deal with the withdrawal of  
12 objections because this is an unusual claims process.

13 MR. CREMONA: Understood, Your Honor, but Rule 41  
14 clearly applies to a contested matter which --

15 THE COURT: Okay.

16 MR. CREMONA: -- Ms. Neville's objection clearly  
17 implicated and invoked Rule 9014.

18 THE COURT: That's true.

19 MR. CREMONA: Your Honor, we also have in their  
20 papers the In RE: 20/20 case which specifically said that  
21 the matter is joined. The claim is filed and it's met with  
22 an adversary complaint. It is joined. And that's precisely  
23 what we have here, Your Honor.

24 THE COURT: Yeah, I think he's right. In essence,  
25 your objection is analogous to a reply. Your claim being

1 the complaint and there are many cases that say the  
2 complaint -- the claim is the functional equivalent of a  
3 complaint. An issue is joined when an objection is made and  
4 that initiates a contested matter.

5 MS. NEVILLE: But, Your Honor, it was joined for  
6 the claims allowance process and not the adversary --

7 THE COURT: Why don't we deal with this threshold  
8 issue? I'd rather -- let's assume that what you're really  
9 doing is withdrawing your claim. Let's deal with the  
10 threshold issue of whether it makes any difference to the  
11 jurisdiction of the Court, because if it doesn't they can  
12 withdraw whatever they want; right? Two weeks.

13 MS. NEVILLE: Two weeks.

14 THE COURT: Ten pages each; okay?

15 MR. CREMONA: Your Honor, I still think -- we were  
16 happy to do that and we certainly will get that done. I  
17 still do think that it is appropriate to move forward on the  
18 Mann pretrial conference because although Ms. Neville says  
19 she wants to move to withdraw the reference, we have seen  
20 what happened last time we were in this situation --

21 THE COURT: Well, I could do that also, but --

22 MR. CREMONA: In order for Your Honor to control  
23 your docket as you did in the Lawrence and Nelsons cases,  
24 you scheduled trial and afforded the opportunity --

25 THE COURT: In those cases it was -- first of all,

1 I have to tell you had it been brought to my attention that  
2 there were pending claims, I never even would have stayed  
3 the trial. I would have gone forward with it. I didn't  
4 realize it at the time.

5 But now it's brought to my attention that there is  
6 a suggestion that either by withdrawing the objection or the  
7 functional equivalent, withdrawing the claim, I no longer  
8 have that good of a jurisdiction. If I conclude that I do  
9 and it doesn't matter whether they withdraw the claim, then  
10 I can go forward with all the cases and I don't have to go  
11 through a Zagano analysis or anything like that.

12 MR. CREMONA: Understood, Your Honor.

13 THE COURT: I mean jurisdiction is a threshold  
14 issue, not Zagano; right? Okay.

15 MR. CREMONA: So would you propose then, Your  
16 Honor, to defer the --

17 THE COURT: I'll hold -- yeah, I want to see the  
18 briefing on this issue and as I said, there are a couple of  
19 cases --

20 MS. NEVILLE: There are some other Delaware cases  
21 that deal with this --

22 THE COURT: I don't know. I just -- you know,  
23 there's another one by a magistrate judge which was raised  
24 in the context of, I think, civil litigation or something  
25 like that, but --

1 MS. NEVILLE: I don't believe that the context of  
2 the cases is important because this is a unique --

3 THE COURT: Ms. Neville, you've been practicing  
4 probably as long as I have. This issue has been around  
5 since the Act, whether you can withdraw your claim to escape  
6 the equitable jurisdiction of the bankruptcy. It's been  
7 around --

8 MS. NEVILLE: Yeah. Okay.

9 THE COURT: -- for years and years and years.  
10 There is case law on this. As I said, Collier's 14 talks  
11 about this in terms of Rule 305. There are various theories  
12 about the right to withdraw your claim and because of my  
13 colloquy with Mr. Dexter, it's clear to me that you don't  
14 have the absolute right to withdraw your claim because if  
15 you did, Rule 3006 would say that.

16 MS. NEVILLE: Rule says -- 3006 also talks about  
17 acceptance or rejection of a plan and I think that to some  
18 extent the reason that the rule was constructed so that you  
19 didn't have the absolute right was related to that --

20 THE COURT: The participation in the case and  
21 getting the benefit of the case. I understand that. But  
22 that's not the only thing that rule has been interpreted to  
23 mean. So what I will do is I'll adjourn the Bam pretrial  
24 conference. What couldn't you agree on? What was the issue  
25 of fact that you couldn't agree on?

1 MR. CREMONA: Your Honor, Ms. Neville has taken a  
2 position that it's not a Ponzi scheme.

3 MS. NEVILLE: Whether or not it was a Ponzi scheme  
4 and whether it was trading.

5 THE COURT: Okay, but that is implicated in your  
6 claim also because if it wasn't a Ponzi scheme, then all of  
7 your transactions would be legitimate distributions; right?  
8 Because it's only because it was a transfer in connection  
9 with --

10 MS. NEVILLE: Not necessarily because it also  
11 could have been just ordinary fraud and not a Ponzi scheme.

12 THE COURT: But if Madoff --

13 MS. NEVILLE: Yeah, I think you're right that he  
14 would have had a right to a claim.

15 THE COURT: Yeah. Okay. So the -- sounds to me  
16 like the adversary proceedings do implicate the claims. I  
17 mean, I guess you could withdraw with prejudice, but you're  
18 not doing that so --

19 MS. NEVILLE: Well, I might. We'll have to see on  
20 that one.

21 THE COURT: Well, you have to make --

22 MS. NEVILLE: This is not a dispute about the ins  
23 and the outs on that one.

24 THE COURT: Okay. All right, but if there's not a  
25 dispute then they can make a motion for summary judgment in

1 here or --

2 MS. NEVILLE: But they're saying --

3 THE COURT: Let me just finish.

4 MS. NEVILLE: Sorry.

5 THE COURT: In here or District Court, say they  
6 don't dispute. First of all, he allocated to a Ponzi scheme  
7 so they've established that because that's evidence. You  
8 would have to come forward with other evidence which is what  
9 you would have to do here anyway, but -- and which you would  
10 have to do in the claims allowance process, I guess. So  
11 they are intertwined. They're very similar issues in  
12 computing the net equity and the fictitious property.

13 MS. NEVILLE: But, you know, similarly --

14 MR. CREMONA: Absolutely, Your Honor. That's --

15 MS. NEVILLE: -- same, Your Honor.

16 THE COURT: Well --

17 MS. NEVILLE: That's the whole point.

18 THE COURT: Let me rephrase that. They are  
19 exactly the same.

20 MR. CREMONA: Precisely, Your Honor, which is why  
21 if they're going to withdraw the claim with prejudice, then  
22 they have to also acknowledge that they foreclosed those  
23 same legal arguments that are the same --

24 THE COURT: Would that be an unfair result?

25 MR. CREMONA: -- on both sides.

1 MS. NEVILLE: You know, I have to say --

2 MR. CREMONA: And then there are no issues  
3 remaining to be adjudicated.

4 THE COURT: What conditions could I impose on you  
5 for withdrawal of --

6 MS. NEVILLE: I have to look at the --

7 THE COURT: You can brief that also, what the  
8 appropriate conditions are.

9 MR. DEXTER: I think Judge Rakoff in the  
10 Consolidated Stern decision held that the issues in the  
11 claims allowance process are not and could not be res  
12 judicata in the avoidance actions. So --

13 THE COURT: As to all -- as to any issue? So if I  
14 had a trial on a claims process which I made a determination  
15 as to what the net deposits and net withdrawals -- or what  
16 the deposits and withdrawals were, you're saying that  
17 wouldn't be preclusive and on the same issue between the  
18 same parties in an adversary proceeding?

19 MR. DEXTER: I don't know if --

20 THE COURT: I can't believe you said that.

21 MR. DEXTER: I don't know if the opinion goes so  
22 far as to say what would happen if Your Honor adjudicated  
23 it, but he quite clearly --

24 MR. CREMONA: Your Honor, I'm happy --

25 MR. DEXTER: He quite clearly says that the claims

1 allowance process resolves nothing more than the Trustee's  
2 determination of net equity, and that's it.

3 THE COURT: But when you withdraw something -- you  
4 know this. When you withdraw something with prejudice, that  
5 can also be an adjudication on the merits which does have  
6 res judicata and collateral estoppel effect.

7 MR. CREMONA: And we cited cases to that effect in  
8 our papers, Your Honor.

9 THE COURT: And maybe if you want to withdraw it,  
10 that's the appropriate disposition. Then you're basically  
11 giving up those defenses and you can go and try your case  
12 wherever you want to try it.

13 MS. NEVILLE: It's not the only defense, Your  
14 Honor. The ins and outs are not the defense. Okay.

15 THE COURT: Okay. All right. I look forward to  
16 your briefings.

17 MR. CREMONA: Thank you, Your Honor.

18 MR. DEXTER: Thank you, Your Honor.

19 MS. NEVILLE: Your Honor is that -- are you saying  
20 a letter brief or a real brief? What is it you --

21 THE COURT: Well, 10 pages single spaced is just  
22 too much on this issue. I would like to see -- is 10 pages  
23 enough? It sounds like it should be enough.

24 MS. NEVILLE: I understand there's a new font for  
25 --

1 THE COURT: Twelve point type.

2 MS. NEVILLE: -- whatever this generation is  
3 called. It's called Times New Roman.

4 THE COURT: I like Georgia. Georgia font in 12  
5 point --

6 MS. NEVILLE: And it's bigger than Times Roman so  
7 that they don't have to write as much.

8 THE COURT: You know, I will tell you that, as you  
9 probably know, the new appellate rules no longer have page  
10 counts; they have word counts.

11 MS. NEVILLE: Oh, God.

12 THE COURT: And most of the comments that were  
13 received to the proposed rule had to do with the word  
14 counts.

15 MR. DEXTER: Your Honor, might it make sense to  
16 extend the briefing to 15 pages?

17 THE COURT: Okay.

18 MR. DEXTER: It seems like there -- the more we  
19 talk about this, the more issues --

20 THE COURT: There are a lot of issues. It's not  
21 an easy issue and I don't think it's just a Rule 41 issue.

22 MS. NEVILLE: But, Your Honor --

23 MR. CREMONA: Your Honor, I would submit that then  
24 we should probably --

25 MS. NEVILLE: The other thing is --

1 MR. CREMONA: -- clarify precisely what the issues  
2 are so as to avoid --

3 THE COURT: Well, the principal issue is whether  
4 the withdrawal of the claim or the functional equivalent of  
5 the withdrawal of the claim affects the Court's jurisdiction  
6 and equitable jurisdiction.

7 MS. NEVILLE: I have another little rug to throw  
8 on this.

9 THE COURT: Go ahead.

10 MS. NEVILLE: I have 15 clients. I don't know how  
11 many Chaitman has, but there are a whole slew of other  
12 people out there and claimants out there. We're going to be  
13 going off on a tangent that's important to however --

14 THE COURT: I don't think I need -- I have a  
15 motion before me.

16 MS. NEVILLE: Right. I was totally going to  
17 resolve this.

18 THE COURT: Ms. Neville, if I conclude as a matter  
19 of law -- and I'm not saying I will -- but if I conclude as  
20 a matter of law that the withdrawal of a claim doesn't  
21 affect the Court's equitable jurisdiction, where the claim  
22 is filed before the adversary proceeding and the equitable  
23 jurisdiction to entertain the adversary proceeding is  
24 dependent on the filing of the claim, and I conclude that  
25 that doesn't defeat the jurisdiction, do you think I'm going

1 to reach a different result in another case?

2 MS. NEVILLE: Did you say would you reach a  
3 different decision in case?

4 THE COURT: Yes. I don't think I need another  
5 omnibus proceeding. Nobody else is seeking to withdraw  
6 their claims.

7 MS. NEVILLE: Well you may be getting one anyway.

8 THE COURT: I don't know if there are any other  
9 defendants out there other than the ones represented by  
10 these two firms.

11 MS. NEVILLE: Oh, yes.

12 THE COURT: Well, they apparently -- maybe they  
13 want to continue to participate on the off chance --

14 MS. NEVILLE: They wanted to see what was going to  
15 happen to me.

16 THE COURT: Or maybe they're saying hey, you know  
17 what? If these theories that Madoff was actually trading  
18 treasury securities or there wasn't a Ponzi scheme prevail,  
19 we'll wind up being net losers and we'll have a big claim in  
20 the case. Maybe that's why they're not participating.  
21 Sounds to me like you don't think much of that theory.  
22 Okay. Two weeks, 15 pages, Mr. Dexter.

23 MR. DEXTER: Thank you, Your Honor.

24 THE COURT: Because you asked for it. The  
25 principal issue is jurisdiction and the second issue, I mean

1 I guess it's kind of -- well --

2 MS. NEVILLE: Conditions.

3 THE COURT: Should I -- does anybody object --  
4 well you may object, but do you object, Mr. Dexter, to my  
5 treating your opposition as a motion to withdraw the claims  
6 -- your claims?

7 MR. DEXTER: Well, not if Your Honor is going to--  
8 I guess I do if Your Honor's going to deny it.

9 THE COURT: Well, because I -- no, no, no. No,  
10 no, no.

11 MR. DEXTER: By the way --

12 THE COURT: I come back to the issue of if  
13 nobody's withdrawing their claims, I don't have to decide  
14 anything.

15 MR. DEXTER: Yeah --

16 THE COURT: There's a pending claim and then I'll  
17 just schedule a trial.

18 MR. CREMONA: Your Honor, I just want to be clear  
19 and Mr. Dexter, I'm sure, will correct me if I'm wrong. I  
20 believe the only three claims that were actually withdrawn  
21 were with respect to the defendants Sarah and Lawrence and  
22 the Nelsons. I don't believe --

23 THE COURT: there's always that supplemental list  
24 that --

25 MR. CREMONA: That was, I believe, only claim

1 objection withdrawals. So we're only dealing with three. I  
2 believe we need to be clear here and I don't think Mr.  
3 Dexter has been clear about that.

4 MR. DEXTER: No, that's correct.

5 MS. NEVILLE: Does that change your view of what  
6 we should be briefing? Because it seems premature to do it  
7 --

8 THE COURT: Well, I have three -- I have those  
9 three requests for withdrawals of claims and I can deal with  
10 the issue as to the other three and just say the rest of the  
11 motion is academic because nobody's withdrawing their claims  
12 and then I can schedule a trial in Bam.

13 MS. NEVILLE: Well, we still have to deal with  
14 what that disallowance meant and --

15 THE COURT: There's no disallowance, though, under  
16 the order. Oh, the disallowance in Bam?

17 MS. NEVILLE: Yeah.

18 THE COURT: And how to you propose to deal with  
19 that?

20 MS. NEVILLE: I hadn't actually thought it  
21 through. I am going to -- motion to withdraw the records  
22 which is going to raise the same issues as you're asking us  
23 --

24 MR. CREMONA: Your Honor, for clarity of the  
25 record, I'd just like to say that we made clear that the

1 Trustee is seeking prejudgment interest in these cases and  
2 if in the motion to withdraw the references made in the Bam  
3 case, which is on all four with the Carol Nelson and Sarah  
4 Lawrence decisions from Judge Daniels which were just  
5 issued, I do think that needs to be considered as a factor  
6 that militates in favor of avoiding prejudgment interest.

7 THE COURT: When the cases first went to Judge  
8 Daniels, there were pending -- there's no question there  
9 were pending live disputes relating to their claims. This  
10 is a little different. Maybe it's a little different.

11 MR. CREMONA: He clarified in his denial of the  
12 motion for reconsideration on the very issues Your Honor  
13 talked about, that Rule 3006 precluded it so it was moot.  
14 So I mean, we'll --

15 THE COURT: He was ruling on the withdrawal of the  
16 claims; right?

17 MR. CREMONA: Correct. He found that that was not  
18 proper and he conferred Your Honor with final adjudicative  
19 authority as a result.

20 MS. NEVILLE: It's only because the Trustee made  
21 an argument that there was a 502(d) claim.

22 MR. CREMONA: No, that's not --

23 THE COURT: I know what I'm going to do.

24 MR. CREMONA: That's not accurate, Your Honor.  
25 I'm happy to get into that argument as well.

1 THE COURT: But I am going to -- I have a better  
2 way to tee this up because we're talking about -- I'm going  
3 to schedule a trial in Bam. You can make a motion to  
4 withdraw the reference and if the District Court withdraws  
5 the reference I won't conduct a trial. But right now, it  
6 appears to me from everything I've seen that I still have a  
7 live claim.

8 MS. NEVILLE: Okay. Let me just add one other  
9 thing about Bam and Mann. First of all, Your Honor may not  
10 be aware because this is coming down the pike, but the  
11 Trustee just filed a motion to have a lot of other discovery  
12 and we have --

13 THE COURT: In Bam?

14 MS. NEVILLE: In all of the cases.

15 MR. CREMONA: No, that's not correct, Your Honor,  
16 and I'm happy to go through --

17 THE COURT: Let her speak and then I'll...

18 MS. NEVILLE: But I do have a request in front of  
19 Judge Moss and to Mr. Pomona about the documents that were  
20 missing from the production for Mann with respect to trading  
21 and trade confirmations. So there is still an issue. We  
22 did not know that the confirmations existed until we had a  
23 meeting on that last Ponzi scheme thing --

24 THE COURT: I'm sorry, what confirmation?

25 MS. NEVILLE: -- last month. The trade

1 confirmations.

2 THE COURT: Right.

3 MS. NEVILLE: We did not know that the Trustee had  
4 and not produced as part of the customer file the trade  
5 confirmations. So I've asked for the trade confirmations.

6 THE COURT: For the in-house -- their own  
7 proprietary trading?

8 MS. NEVILLE: Right.

9 THE COURT: Okay.

10 MR. CREMONA: Your Honor, can --

11 MS. NEVILLE: So I've asked for those and Mr.  
12 Cremona and I were exchanging letter arguments about that  
13 and there are, apparently, foxes of trade confirmation which  
14 I'm willing to go and look at because that's something that  
15 I need for part of this -- for everyone in the trials.

16 MR. CREMONA: Your Honor, I would just address  
17 that briefly. We receive a letter from Ms. Neville  
18 yesterday on the eve of this pretrial conference seeking to  
19 join the Judge Moss trading records to see if Your Honor --

20 THE COURT: She hasn't been part of this?

21 MR. CREMONA: No.

22 THE COURT: Okay.

23 MR. CREMONA: And that was pending since 2016 --

24 MS. NEVILLE: Yes, I have.

25 MR. CREMONA: That is not accurate, Your Honor.

1 Also if I may just complete the facts here. There is an  
2 order that Your Honor is aware of that requires a  
3 stipulation to be signed by Your Honor for a matter to be  
4 referred to Judge Moss that wasn't adhered to. This is  
5 belated attempt to join in a proceeding that's been going on  
6 for two years.

7 It is procedurally improper and let me just  
8 clarify, Your Honor, what Ms. Neville is asking for are  
9 supplemental Rule 26 disclosures which we made in 2014, to  
10 be clear, and Your Honor is aware of all of the disclosures  
11 that we've made have been clear that we have not disclosed  
12 all of our documents. We have made it abundantly clear what  
13 is scanned and not scanned; what's in the data room, what's  
14 not. It is disingenuous to say that she is not aware that  
15 trade confirmation existed. But putting all that aside --

16 THE COURT: You haven't stipulated to go before  
17 Judge Moss?

18 MS. NEVILLE: No, Your Honor, but -- just one  
19 second, Your Honor.

20 MR. CREMONA: So that shouldn't hold up the  
21 matter, Your Honor. And, but putting all that aside, the  
22 Trustee has said fine. If you would like to go look at  
23 those documents, go ahead. That should not delay this trial  
24 and by the way, Ms. Neville has already indicated she's  
25 going to move to withdraw the reference and by the way

1 there's no live discovery dispute that could even be  
2 referred to Judge Moss.

3 Discovery closed in 2015. She's asking for -- Ms.  
4 Neville didn't say I comply with open and existing  
5 discovery. She never did request the trade confirmations.  
6 She didn't serve discovery in seven of the 15 cases that she  
7 is trying to submit to Judge Moss. It's important for Your  
8 Honor to know the facts. I apologize for belaboring them,  
9 but we can't just -- I think it's important to know exactly  
10 what the facts are.

11 THE COURT: It sounds to me that it's a threshold  
12 matter. You're not part of the Judge Moss proceeding.

13 MS. NEVILLE: Your Honor, I'd like to dispute that  
14 because one of the things that is include in that is all of  
15 the document requests that Ms. Chaitman made in connection  
16 with the Madoff deposition, that is what she is focusing on  
17 and I was specifically a participant in that.

18 THE COURT: When did you make document requests,  
19 though? She was making them on behalf of her own clients;  
20 wasn't she?

21 MS. NEVILLE: Well, we made them jointly.

22 THE COURT: And she stipulated to go before Judge  
23 Moss which you haven't done. Here's what I'm going to do.  
24 I'm going to schedule a trial. Discovery closed years and  
25 years ago. You're not a participant in any of these

1 disputes before Judge Moss. You didn't stipulate to submit  
2 any disputes to Judge Moss. I'm not aware of any disputes  
3 before me that should hold up this trial.

4 I'm going to schedule the trial, give you a chance  
5 to go and make a motion to withdraw the reference and deal  
6 with that. With respect to this issue of deeming a motion  
7 to be made, make your motion to withdraw your claim if  
8 that's what you want to do. As far as I'm concerned in the  
9 absence of withdrawal, there's a live claim. And the issues  
10 that are -- and maybe you don't want to withdraw your claim  
11 because you think you'll hit a home run at the trial and  
12 it'll turn out you'll be a net loser and be able to  
13 participate in the estate. I don't know why you're not  
14 doing it, but if you haven't withdrawn your claim there's no  
15 issue.

16 So I'll schedule the trial in Bam.

17 MR. CREMONA: Your Honor, we've conferred with our  
18 testifying expert and can propose certain dates if that  
19 convenient for the Court.

20 THE COURT: What dates?

21 MR. CREMONA: The testifying experts and the trial  
22 team are available during the first week of December.

23 THE COURT: How long do you think this trial is  
24 going to take?

25 MR. CREMONA: Two to three days, I would say, Your

1 Honor.

2 THE COURT: How long you think the defense will  
3 take?

4 MS. NEVILLE: I have no idea, Your Honor. I am  
5 going to move to withdraw the reference --

6 THE COURT: Okay.

7 MS. NEVILLE: -- and I do think that that is too  
8 soon for --

9 THE COURT: Why? The case has been -- discovery's  
10 been closed for three years, four years.

11 MS. NEVILLE: Discovery's been closed and now  
12 we're learning all these things that have not been ever told  
13 to us in 10 years. You know, I'm tired of them telling us  
14 that we've been in this case for 10 years when we suddenly  
15 learn that there are all these documents that we haven't  
16 been given access to.

17 THE COURT: Look. There have been live discovery  
18 disputes before Judge Moss regarding this very issue.  
19 You're not part of that and now you're suddenly saying hey,  
20 wait a minute, there's all this other information --

21 MS. NEVILLE: I --

22 THE COURT: Let me finish. That I may or may not  
23 have asked for. It goes back years and years and years.  
24 I'm going to schedule the trial and you can make a motion to  
25 withdraw the reference. But this case is trial ready. The

1 mediation was concluded almost two years ago. What are  
2 those dates?

3 MR. CREMONA: The first week, we're fully  
4 available.

5 THE COURT: All right. I'll schedule it for  
6 Monday, December 3rd. That gives you plenty of time to move  
7 to withdraw the reference.

8 MS. NEVILLE: Fine.

9 MR. CREMONA: Thank you, Your Honor. Would you  
10 like us to submit an order that?

11 THE COURT: Yeah. And you can exchange witness  
12 lists and documents a week before the trial.

13 MS. NEVILLE: There's not going to be a trial in  
14 this (indiscernible).

15 THE COURT: All right. Well, maybe there will but  
16 if there is, plaintiffs can use numbers. You know, you can  
17 give them to me in a loose leaf separated by exhibits. You  
18 can use letters, separated by exhibit tabs.

19 MR. CREMONA: Understood, Your Honor.

20 THE COURT: I guess I don't have any other pending  
21 matters before me because they're not seeking to withdraw  
22 their claims. If you seek to withdraw your claims, you'll  
23 have to make a motion, Mr. Dexter, and then we'll deal with  
24 each claim.

25 MR. DEXTER: We'll make the motion.

1 THE COURT: All right. Let me just...

2 MR. CREMONA: Just to be clear, Your Honor, so we  
3 all have clarity of the calendar, the three cases where the  
4 attempted claim withdrawal were made, we have a pretrial  
5 conference scheduled on October 10th.

6 THE COURT: Here?

7 MR. CREMONA: Yes.

8 THE COURT: All right, I'll fix trial dates and  
9 then unless there's a motion to withdraw and then I'll deal  
10 with the issues. I don't really have to deal with these  
11 jurisdictional issues yet, but if you make the motion to  
12 withdraw the reference -- I'm sorry, if you make the motion  
13 to withdraw the claim that underlying issue is there whether  
14 it makes a difference and I think in some of these, couple  
15 of these cases I mentioned, the motion was denied as moot  
16 because it really had no effect on anything. All right?

17 MR. DEXTER: Okay.

18 MR. CREMONA: Thank you, Your Honor.

19 MR. DEXTER: Just so Your Honor is aware, we'll be  
20 filing today our petition for mandamus in the Second Circuit  
21 on the jury trial issue.

22 THE COURT: A mandamus in the Second Circuit?

23 MR. DEXTER: That's right.

24 THE COURT: On the issue that Judge Daniels  
25 decided?

1 MR. DEXTER: That's right.

2 THE COURT: Okay.

3 MR. CREMONA: I don't see that having any  
4 procedural effect on the trial, Your Honor.

5 THE COURT: What you be compelling him to do or  
6 not do?

7 MR. DEXTER: Give the defendants their Seventh  
8 Amendment right to a jury trial.

9 THE COURT: But you don't have a Seventh Amendment  
10 right to a jury trial with a pending claim. The Second  
11 Circuit and the Supreme Court have ruled that.

12 MR. DEXTER: Well, I mean, are we going to argue  
13 that right now again?

14 THE COURT: No, no. You can argue that before the  
15 Second Circuit. All right, so I guess I'll deny your motion  
16 without prejudice since there really are no withdrawal --  
17 motions to withdraw.

18 The notice -- except to the extent that notices of  
19 withdrawal in these three cases are a nullity because they  
20 didn't follow the appropriate procedure and that's without  
21 prejudice, obviously. You've met -- you can make a motion  
22 to withdraw your claim.

23 MR. CREMONA: Again, understood Your Honor, but I  
24 would say the same logic applies to the remain purported  
25 withdrawals of the objections. As Ms. Neville acknowledged,

1 I don't see why the motion should be denied. I think we've  
2 reset the matter and now we have additional briefing, but on  
3 the papers before you, Your Honor, I think the motion should  
4 be granted.

5 THE COURT: I'll grant the motion to the extent  
6 it's saying that Rule 3006 applies because Judge Daniels  
7 said it applied and also because this proceeding is supposed  
8 to be administered or adjudicated to the extent possible in  
9 accordance -- as an ordinary bankruptcy.

10 MR. CREMONA: Absolutely.

11 THE COURT: But to tee this up procedurally, I'll  
12 conclude that you require a -- I hate to interrupt myself  
13 but I'm being told that she's not even trying to withdraw  
14 her claims.

15 MR. CREMONA: She's trying to withdraw her  
16 objections. Again, Your Honor, I --

17 THE COURT: But Rule 3006 doesn't deal with that.

18 MR. CREMONA: But Rule 41 does and they've invoked  
19 this as a contested matter. I think it is worth going  
20 through that, but putting that aside, what I'm trying to  
21 accomplish here, Your Honor, is to invoke the status quo.  
22 They have no legal --

23 THE COURT: But she's still -- it's the same  
24 thing. She would have to make a motion to withdraw her  
25 claim under Rule 41 or withdraw whatever it is she --

1 MR. CREMONA: I agree, Your Honor. That's what --  
2 I'm suggesting that --

3 THE COURT: All I'm saying -- let's do it this way  
4 because we're going around in circles here. To the extent  
5 they purported to withdraw their objection or their claim  
6 without a motion, those acts are a nullity. With respect to  
7 the claim, Rule 3006 applies for the reasons I've stated and  
8 you have to make a motion.

9 With respect to the objection, it's part of a  
10 contested matter. It's a pleading in a contested matter and  
11 the effect of which would be, in their view, the termination  
12 of a contested matter. That's why they're doing it. So  
13 they have to make a motion on the Rule 41 to do that.

14 And let's just leave it at that. And then we can  
15 go through them on a case-by-case basis. There may be some  
16 cases where there's no dispute. I don't know. I doubt it,  
17 but they all seem to be the same in terms of the legal  
18 issues. And then we can get into the issue of well, gee, if  
19 you can withdraw it -- a motion, what are the appropriate  
20 terms or are there appropriate terms to permit you to  
21 withdraw.

22 So doing it this way is... You know, beyond that,  
23 and everything is without prejudice to your rights to make a  
24 motion to withdraw or make a motion to withdraw their rights  
25 to oppose and I don't have to resolve the jurisdictional

1 issue now because as long as I have a live claim before me  
2 or what appears to be live claim -- and an objection by the  
3 way -- what you're really trying to do, if that's the route  
4 you want to go, why don't you just make a motion to withdraw  
5 both the objection and the claim and basically consent to  
6 the determination that you have no net equity which is what  
7 you're really talking about. Right?

8 Then we can talk about what that means in terms of  
9 the adversary proceeding.

10 MS. NEVILLE: I think you and I differ in what  
11 that means.

12 THE COURT: I understand. I understand we differ  
13 but you two sides differ also, so --

14 MS. NEVILLE: That's true.

15 THE COURT: That's why we're here.

16 MS. NEVILLE: I'm still not sure what the outcome  
17 of this was --

18 THE COURT: Okay.

19 MS. NEVILLE: -- because I actually thought that  
20 at one point I said well, why don't I just allow them to --  
21 why don't I just agree to this motion. So I won't withdraw  
22 my objections. What's the difference? There is no  
23 prejudice to the adversary proceeding or to the claims  
24 process by withdrawing it, just ministerial. So now, they  
25 have to go forward and file this omnibus motion --

1 THE COURT: Well, no, no, no.

2 MS. NEVILLE: -- listing the three cases.

3 THE COURT: You're saying it's ministerial but  
4 it's procedurally improper.

5 MS. NEVILLE: Well, it's not procedurally improper  
6 if they haven't answered in that particular adversary  
7 proceeding.

8 THE COURT: In the adversary proceeding and the  
9 claims objection.

10 MS. NEVILLE: And the claims --

11 THE COURT: Well, but they have --

12 MS. NEVILLE: -- contested matter.

13 THE COURT: You know, essentially --

14 MS. NEVILLE: It can't be both. It can't be that  
15 those cases that went up to the Second Circuit are directly  
16 a part of my claims resolution process and that they have  
17 not finally disallowed the claim. It can't be that that  
18 procedure where they have actually disallowed all of the  
19 things that are raised in the objection have been ruled on  
20 by the Second Circuit and that there's absolutely not  
21 finality to the claim. That can't be. You can't keep  
22 attaching --

23 THE COURT: But you're still --

24 MS. NEVILLE: -- an adversary proceeding that says  
25 I'm not dealing with the --

1 THE COURT: You're still disputing the computation  
2 of net equity. In other words, there are legal issues and  
3 factual issues and even if all the legal issues are decided  
4 against you, you're saying not only there are no fictitious  
5 profits and as a consequence there is net equity because the  
6 trustee hasn't correctly computed the ins and outs. This  
7 wasn't a Ponzi scheme; there was actual trade. That's what  
8 you're saying.

9 MS. NEVILLE: Let me --

10 THE COURT: I don't want to hear -- Ms. Neville, I  
11 don't want to hear any more about this.

12 MS. NEVILLE: But I haven't really -- it really  
13 clears it up for me.

14 THE COURT: I really --

15 MS. NEVILLE: It's different to say I do not have  
16 a claim and the calculation for that equity is okay and I  
17 have a defense under 548(c).

18 THE COURT: In terms of your motion, any attempts  
19 to withdraw a claim or an objection in a pending contested  
20 matter is a nullity without prejudice to their right to make  
21 a motion to withdraw the claim under 3006 or to withdraw --

22 MS. NEVILLE: The objection.

23 THE COURT: -- their objection under Rule 41;  
24 okay?

25 MR. DEXTER: Understood. Thank you, Your Honor.

1 THE COURT: All right. We don't have to deal with  
2 the jurisdictional issue now but in response to a motion to  
3 withdraw the claim or something like that, you can argue it  
4 doesn't make a difference because there's still equitable  
5 jurisdiction.

6 MS. NEVILLE: Let me ask you something.

7 MR. CREMONA: Your Honor, can I --

8 THE COURT: We're done.

9 MR. CREMONA: Can we submit an order the  
10 memorialized Your Honor's ruling?

11 THE COURT: Yes. Now, next, I have one more  
12 matter here.

13 MS. NEVILLE: That's not mine.

14 THE COURT: And this --

15 MR. DEXTER: I hope this will be a simple one,  
16 Your Honor.

17 THE COURT: Well, the problem is Judge Moss has a  
18 lot of paper in her little office. And the impression I got  
19 -- and maybe there's an issue about what's still alive  
20 before Judge Moss and what isn't and those papers can be  
21 returned, destroyed, whatever it is just -- or you can  
22 supply the documents on a disc or something like that. It's  
23 a storage issue, basically.

24 MR. DEXTER: Okay, so how do you propose --

25 THE COURT: Why don't you tell me -- you don't

1 have to do it this second -- but tell me what you think are  
2 still live issues before Judge Moss. I understand this  
3 trading records issue appears to still be a live issue, but  
4 there must have been other issues that were referred to him  
5 that are no longer live and it seems to me that those  
6 records can be disposed of.

7 And maybe the answer is that to the extent there  
8 are papers there that don't bear -- part of live dispute but  
9 don't bear on any of the issues right now, you just retrieve  
10 them and then you can resubmit them or something like but at  
11 a minimum, let's find out what it is or what papers you  
12 think are part of this live dispute; okay?

13 MR. DEXTER: Okay. So should we submit a letter  
14 to Your Honor?

15 THE COURT: Yeah, you can submit a letter. You  
16 know, you can respond also, but --

17 MR. DEXTER: Okay.

18 THE COURT: -- to the extent you can resolve the  
19 storage issue --

20 MR. DEXTER: Okay.

21 THE COURT: -- it would be helpful.

22 MR. CREMONA: We're happy to help resolve --

23 THE COURT: Okay.

24 MR. CREMONA: -- verify what's still pending.

25 MR. DEXTER: Thank you, Your Honor.

1 THE COURT: Maybe you'll surprise him. Actually,  
2 copy him on the letter.

3 MR. DEXTER: Okay.

4 THE COURT: Because he may think he resolved  
5 something and -- okay. You'll be back this afternoon, 2  
6 p.m.

7 MR. DEXTER: Thank you, Your Honor.

8 THE COURT: All right.

9 MS. NEVILLE: Thank you, Your Honor.

10 THE COURT: Thank you.

11 (Recess)

12 THE COURT: All right. Apologize for the delay  
13 but I had a conference on the phone. Picard versus Shapiro.

14 MR. ROLLINSON: Good afternoon, Your Honor. James  
15 Rollinson here on behalf of the Trustee. With me is Torello  
16 Calvani.

17 MR. MILLER: Good afternoon, Your Honor. Robert  
18 Miller here for defendants.

19 MR. LAX: And Barry Lax. Thank you, Your Honor.

20 MR. ROLLINSON: Good afternoon, Your Honor. We're  
21 here probably on something that's not your favorite subject,  
22 a discovery dispute. We were -- we thought long and hard  
23 before bringing it to your attention, but now that we're  
24 moving into the next phase of that discovery we just want to  
25 clarify a couple issues so that we're not faced with a

1 situation a couple months down the road with some questions  
2 unanswered.

3 The first area that we want to pin down is having  
4 an assurance that the defendants have diligently searched  
5 for and produced all document responsive to the Trustee's  
6 request to which they were compelled to respond. And we  
7 have some questions on that based on their productions.

8 THE COURT: What form would that -- all right, why  
9 don't you tell me --

10 MR. ROLLINSON: Sure. And secondly, just an  
11 explanation of why. I think we had expressed during the  
12 last conference before Your Honor when we were arguing the  
13 motion to compel. We hoped we weren't in a situation where  
14 for approximately two years we're fighting over requests --  
15 requests which were narrowed 15 months ago and we fight --  
16 we waste a lot of resources including your own, Your Honor,  
17 and there are no responsive documents.

18 So as it relates to David Shapiro, Mr. Shapiro's  
19 younger son, he didn't produce one document in response to  
20 any of our requests. The Citrons produced a total of 18  
21 document, only five of which related to one of these core  
22 accounts, as we call them. So we got virtually no  
23 production from any of the two children after months and  
24 months and months which had delayed this case moving forward  
25 as far as depositions goes.

1                   So we do have some open questions. Are there  
2 still documents?

3                   THE COURT: Well, let's get to the first question.  
4 What is it that you think you need from them to confirm that  
5 you've gotten all the documents that are responsive to your  
6 request?

7                   MR. ROLLINSON: Well, one, that they diligently  
8 searched for them. Secondly, and explanation of to the  
9 extent -- and we are a bit at a loss why these documents  
10 don't -- wouldn't have existed and they would have been in  
11 their possession. We asked for all account statements  
12 relating to all accounts.

13                  THE COURT: Are you going to take their  
14 depositions?

15                  MR. ROLLINSON: We are.

16                  THE COURT: Why don't you just ask them at their  
17 depositions?

18                  MR. ROLLINSON: The problem is, and we were  
19 talking before you came in, Your Honor, about scheduling  
20 those. If we're two months down the road, we're taking  
21 their deposition. There are open questions about documents.

22                  THE COURT: What is it that you want from them?

23                  MR. ROLLINSON: Well --

24                  THE COURT: You want some sort of a statement from  
25 each of the defendants individually? Is that what you're

1 looking for?

2 MR. ROLLINSON: Correct, to make sure that we do  
3 have all responsive documents and an explanation of why  
4 there aren't any documents. Why --

5 THE COURT: But that's -- ask them that at a  
6 deposition and you can develop your arguments about  
7 spoliation or whatever else you have. But they're going to  
8 get up and they're going to tell me they produced all the  
9 documents and it becomes a he said, she said issue and it  
10 just makes more sense if you're going to take their  
11 depositions anyway to establish these facts that you're  
12 seeking to establish.

13 MR. ROLLINSON: And I agree that's, I think, a  
14 sensible approach.

15 THE COURT: Because at the end of the day, they  
16 may not have any more documents to turn over. Whether they  
17 should or shouldn't have the documents is a different  
18 question, but...

19 MR. ROLLINSON: Correct. I just don't want to be  
20 in a position where two months down the road with two months  
21 left in the discovery period which now we have a firm cutoff  
22 and there's still questions about documents.

23 THE COURT: If it comes up in a deposition that  
24 they have documents that are responsive and they didn't turn  
25 them over, that would be a basis to extend the discovery,

1 presumably. But we've been going at this for how many years  
2 now.

3 MR. ROLLINSON: Agreed. Agreed, and we were  
4 surprised that we didn't get any responsive documents. The  
5 other point of confusion is that when the wrote to Your  
6 Honor they indicated that they produced previously a number  
7 of documents to us in connection with their Rule 2004  
8 production.

9 THE COURT: I thought that was Stanley who  
10 produced the documents.

11 MR. ROLLINSON: You're correct. There were no  
12 documents from either of the children and I reviewed it and  
13 confirmed that there were no accounts --

14 THE COURT: You know, this case has taken on a  
15 satellite litigation over documents. You're going to take  
16 their depositions anyway. You have what you have. Ask  
17 them. Go through each of the requests if you think it's  
18 appropriate. Say, you know, what'd you do to look for those  
19 documents. What happened to the account statements? I  
20 don't know if they were receiving them or Stanley was  
21 receiving them but what happened to them?

22 MR. ROLLINSON: Well, it certainly gives us some  
23 comfort if we're faced with a situation where they're  
24 additional documents or there are issues that we're not  
25 going to be backed up against the discovery cutoff and if

1 there is an issue, we'll bring it to --

2 THE COURT: Do you have any doubt that if it turns  
3 out one of them has a stack of account statements that  
4 weren't turned over and there's a reason -- and you didn't  
5 have them before and there's a reason to take -- to get more  
6 discovery ruling, then I'll extend the discovery deadline.  
7 But just take their deposition.

8 MR. ROLLINSON: Okay. Fair enough.

9 THE COURT: Now with respect to this issue of  
10 spoliation, I assume you want to take the deposition first  
11 anyway but you'd have to do that by a separate motion.

12 MR. ROLLINSON: Okay.

13 THE COURT: All right? Anything else?

14 MR. MILLER: Nothing for defendants, Your Honor.

15 THE COURT: Very good. So tell me what the  
16 schedule is in this case now? I want to move it along. I'd  
17 like to try this case.

18 MR. ROLLINSON: Currently we have a discovery --  
19 fact discovery cutoff of the end of January. We were  
20 conferring again, Your Honor, about scheduling depositions.  
21 We don't have a ton of depositions, I think. Just as a  
22 preview, I guess, we did file a motion, Your Honor, for a  
23 Rule 30 order to depose Ms. Bongiorno who's incarcerated.  
24 And I guess they'll formally --

25 THE COURT: A Rule 30 on behalf of BLMIS?

1 MR. ROLLINSON: On behalf of the Trustee seeking  
2 an order authorizing her deposition.

3 THE COURT: Do give testimony on behalf of BLMIS?

4 MR. ROLLINSON: On behalf to the Trustee, correct,  
5 in this case.

6 THE COURT: No, wait. She's not a 30(b)(6)  
7 witness or --

8 MR. ROLLINSON: No, no, no. As an individual. As  
9 an individual.

10 THE COURT: Okay, but she's incarcerated. You  
11 have to go through a separate procedure to take her  
12 deposition.

13 MR. ROLLINSON: Yes, Your Honor. We filed that  
14 motion. We're just bringing it to your attention. It might  
15 not be on your radar but we filed that last --

16 THE COURT: When is that returnable?

17 MR. ROLLINSON: On next omnibus date in October.

18 THE COURT: Is there an objection?

19 MR. LAX: No, we're going to join in the motion,  
20 Your Honor.

21 THE COURT: All right, so why don't you just  
22 submit a --

23 MR. LAX: Stipulation?

24 THE COURT: -- a consent order.

25 MR. LAX: Okay. That's fine.

1 MR. ROLLINSON: Fair enough.

2 THE COURT: I mean, your firm has done several of  
3 these already, so --

4 MR. ROLLINSON: Correct.

5 THE COURT: Okay, good.

6 MR. ROLLINSON: So we'll do that, Your Honor,.

7 THE COURT: All right. And besides Ms. Bongiorno  
8 and the defendant, what other fact witnesses are there in  
9 this case?

10 MR. ROLLINSON: If they're additional witnesses,  
11 it's just a couple. We were talking about that. We weren't  
12 quite sure. There's Mr. Konigsberg who is the accountant.  
13 We were talking about there are a couple other former BLMIS  
14 employees that are not incarcerated that we're talking about  
15 but it's --

16 MR. LAX: Maybe Mr. Kugel.

17 MR. ROLLINSON: -- a very limited number. David  
18 Kugel being one of them.

19 THE COURT: He's not incarcerated?

20 MR. ROLLINSON: He's not; no. And he's local. He  
21 lives on Long Island, so...

22 THE COURT: All right. In terms of expert  
23 discovery, I don't know if they're technically experts but I  
24 assume you have your forensic accountants that have  
25 reconstructed the accounts and they'll testify as to that;

1 right?

2 MR. ROLLINSON: Correct.

3 THE COURT: Do you want to take their depositions?

4 MR. LAX: I'm going to take their depositions,  
5 Your Honor, and then I believe we may have some experts as  
6 well. Because remember, Your Honor, these are not the split  
7 strike strategy account. These are different accounts.

8 THE COURT: Are these the convertible overcharge  
9 accounts?

10 MR. LAX: Yes.

11 MR. ROLLINSON: And then, Your Honor, there were -  
12 - they're called the portfolio accounts. It can come under  
13 different names, but they were the accounts managed or  
14 administered by Ms. Bongiorno which were the long-term buy  
15 and hold. That was -- when we talk about the core accounts,  
16 those are those accounts.

17 THE COURT: She should have a pretty good  
18 knowledge of the business judging from the PW proceeding.

19 MR. ROLLINSON: She does.

20 THE COURT: Okay. And how long do you think that  
21 -- do you already have expert reports as to this particular  
22 case prepared?

23 MR. ROLLINSON: I think that as far as the  
24 forensic experts go, those will -- they're probably not  
25 prepared yet because there's sort of a pipeline for those,

1 but those will be prepared and served, I believe in the time  
2 that is provided in the amended case management order. And  
3 we have Mr. Dubinsky as well.

4 THE COURT: Okay.

5 MR. LAX: And then, Your Honor, there is an  
6 outstanding subpoena right now by the Trustee to --

7 THE COURT: For who?

8 MR. LAX: -- JP Morgan Chase. I believe they  
9 filed their responses and objections last night and it's for  
10 Stanley Shapiro's loan documentation for his mortgage from  
11 1995. So we do plan to move to quash that subpoena.

12 THE COURT: On what basis?

13 MR. LAX: I don't know what the relevance is for a  
14 1995 mortgage on his apartment in Manhattan -- the loan  
15 documentation.

16 THE COURT: Do you have standing to move to quash  
17 a third-party subpoena other than on privacy grounds?

18 MR. LAX: On privacy grounds?

19 THE COURT: Other than privacy grounds.

20 MR. LAX: I believe relevance grounds, Your Honor.

21 THE COURT: No, I know I have a decision about  
22 this, I think, in this case also.

23 MR. ROLLINSON: I think I heard argument on it,  
24 actually.

25 THE COURT: Okay.

1 MR. ROLLINSON: The one thing --

2 MR. LAX: I will make sure to --

3 THE COURT: Yeah, I know. I've had that issue a  
4 couple of times about the standing of a party to object to a  
5 non-party subpoena. For example, sometimes I get an  
6 objection on burdensome grounds, and my response is, "Well,  
7 if the subpoenaed party isn't saying it's burdensome, why  
8 are you saying its burdensome?" And I had somebody say,  
9 "well, then I have to look at the stuff." After they told  
10 me that it was irrelevant. My response is, "Well, if it's  
11 irrelevant, why are you looking at it?"

12 MR. LAX: but, Your Honor, it'd be the same thing  
13 if they tried to subpoena for his financial records.

14 THE COURT: Well, financial records and personal -  
15 - you always have a right to object on privacy grounds.

16 MR. LAX: Right.

17 THE COURT: But he is a party and the financial  
18 disclosures he made may be relevant to his BLMIS accounts.

19 MR. LAX: Maybe.

20 THE COURT: Okay. It's not a very high threshold  
21 to meet; you know.

22 MR. LAX: Okay.

23 MR. ROLLINSON: And the one thing we're trying to  
24 see --

25 THE COURT: I'm not saying don't make the motion,

1 I'm just --

2 MR. LAX: Okay.

3 THE COURT: I've dealt with this issue, I know, a  
4 couple time.

5 MR. LAX: Okay.

6 MR. ROLLINSON: And we're just -- one thing we're  
7 trying to -- which we did at the outset is with JP Morgan  
8 Chase's counsel, first we want confirmation from him whether  
9 any documents even exist responsive to the subpoena and  
10 obviously if they no longer have any documents responsive,  
11 then it moots the --

12 THE COURT: When was --

13 MR. ROLLINSON: -- and we're happy to withdraw the  
14 subpoena.

15 THE COURT: When was the loan no longer  
16 outstanding?

17 MR. ROLLINSON: I believe it was in 1998.

18 THE COURT: That's about the cutoff date for the  
19 documents from --

20 MR. ROLLINSON: It could be close. We just don't  
21 know. We got their objections last night which was a little  
22 unclear of whether --

23 MR. LAX: I would say it was very unclear.

24 MR. ROLLINSON: It said to the extent we have  
25 documents, we'll produce them so we just have to --

1 THE COURT: So ask them when they're going to  
2 produce them, then.

3 MR. LAX: Right, and then we'll move before that.

4 THE COURT: All right.

5 MR. ROLLINSON: That's all.

6 THE COURT: Okay, so let me schedule, I guess,  
7 another status conference. You say your fact discovery is  
8 ending at the end of January.

9 MR. LAX: End of January. Yep.

10 THE COURT: Say February 7th --

11 MR. ROLLINSON: Okay.

12 THE COURT: For conference.

13 MR. ROLLINSON: That's fine, Your Honor.

14 MR. LAX: Thank you, Your Honor.

15 THE COURT: Okay, thank you.

16 (Whereupon these proceedings were concluded at  
17 2:25 PM)

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I N D E X

RULINGS

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.

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